decision on section 60 of the Evidence Ordinance requiring all evidence to be direct evidence, the document was admissible only to prove its existence and receipt but was inadmissible as hearsay evidence when the object was to establish the truth of what was in that statement.

Seen in this way as indeed Exh. D18 must be, the defence could not therefore be said to have established the existence of this clean bill of lading.

In my view, however, and with respect, the case could be decided other than on this alleged clean bill of lading. If the question was asked where and when the damage to the maize was caused and the answer could be found on the evidence adduced, then the whole issue between the parties becomes clear. The evidence of the lighterman which I had referred to earlier, even though somewhat unsatisfactory, was in my view sufficient to establish that the damage was caused by sea-water contaminating the shipment after the bags had been off-loaded the ship and were on their way in the lighter. His evidence was, it is needless to point out, unchallenged. I have not lost sight of the admission of the lighterman that the bags were slightly torn whilst they were in the steamer but the contamination was by soaking in sea water and not exposure to air and the surveyor found the bags still wet. This must necessarily support the evidence of the lighterman. The bags were gunny bags and there was no requirement that the maize must be in water-proof containers. In my view of the evidence, it must establish beyond argument that the damage was caused when the lighter shipped water in the rough conditions it encountered and the sea water splashed over the porous gunny bags. If that was so, there could be no claim against the carrier, and a clean bill of lading if issued, would not have been material on the facts of this case. There could be and to my mind there was no breach of clause 5 of the claims procedure.

Whether the insurers had a claim against the lighterman through the assignees of the policy was a matter which was not before the magistrate. It was also not taken on appeal and it does not lie within my province to deal with it.

But on the facts, the damage was caused after the goods had left the ship and before arrival at the warehouse. The "warehouse to warehouse" provision applies, within the issues raised in the pleadings.

I am however advised that this was a test case. Other cases are said to await this decision. I am afraid I cannot see how this could be so. This case was determined on the facts peculiar to it, and on the issues raised in the pleadings. No issues were raised whether the policy covered the landing of the goods *via* lighters or whether it was customary to land the goods in the Penang roadstead. They would appear capable of being raised and while on this appeal it is not open to me to consider them since they were not raised, I would take the liberty of reading out the following passages from *Halsbury's* Laws of England (3rd Edn.) Vol. 22 at pages 59-60 in the hope that the other cases could be resolved without resort to litigation.

"106. *Landing of goods in customary manner.* The goods are 'discharged and safely landed' within the meaning of the above clause when they are landed in the customary manner. They are landed in the customary manner if delivered on shore at the ordinary quays, wharves or customary landing places within the limits of the port of discharge.

It is frequently necessary on account of the shallowness of the water, to employ smaller craft, such as lighters or shallops, or sometimes men, to carry the goods from the ship to the shore. When this is done in the manner usual at the port of discharge, the underwriters are liable for any loss which may happen to the goods in the course of their being so carried.

107. *Receipts of goods into consignee's lighters.* Sometimes the consignee himself takes possession of the goods by receiving them out of the ship into his own lighters. In this case the goods are not protected by the ordinary clause of the policy during their carriage in the lighters, unless, at least, it is customary at the port of discharge for the consignee to send his own lighters for landing his goods. Where (as is very usual) the policy contains the clause "including risk of craft to and from the ship," the goods are protected when carried in the consignee's own lighters, whether such custom prevails or not, since otherwise no effect would be given to those words."

In so far as this appeal is concerned, the decision of the learned magistrate is confirmed. Profits' costs to the respondents.

Appeal dismissed.

AHMAD BIN HUSSIN v. HAJJAH MEK BINTI HAJI HUSSAIN

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) August 12, 1972]

[Kota Bharu — Federal Court Civil Appeal No. 111 of 1971]

Land Laws — Sale of land — Failure to transfer — Land occupied by purchaser — Land registered in name of son of vendor — Claim by registered proprietor — Counterclaim by purchaser — Whether barred by limitation — Limitation Ordinance, 1953.

In this case the original plaintiff had claimed possession of certain lands from the defendant, alleging that he was entitled to them as the registered proprietor and as the son of one Merah to whom the land belonged. The defendant counterclaimed that the lands be registered in her name, alleging that the lands had been sold by Merah to her. The plaintiff denied the sales and further pleaded that the defendant's claim was barred by limitation. The learned trial judge held on a balance of probabilities that the defendant had bought the land from Merah. He further held that the counterclaim was not barred by limitation. The plaintiff appealed.

Held, dismissing the appeal: (1) the appeal court could not interfere with the finding of the trial judge that the defendant had bought the land from the Merah;

(2) the defendant's right of action accrued not from the date of the sale but from the time when the defendant asserted her right and it was infringed by Merah or the plaintiff or from the time when there was a clear and unequivocal threat by Merah or the plaintiff to infringe that right;

(3) on the facts the learned trial judge was entitled to hold that the defendant's counterclaim was not statute-barred, as the plaintiff had not discharged the onus of proving that it was.

Cases referred to:-

(1) *Munah* v. *Fatimah* [1968] 1 M.L.J. 54.

(2) *Ponnusamy & Anor.* v. *Nathan Ram* [1959] M.L.J. 86.

(3) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32.

(4) *Ng Moh* v. *Tan Bok Kim & Anor.* [1969] 1 M.L.J. 46.

(5) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49.
(6) *Bolo* v. *Koklan* 57 I.A. 352.

FEDERAL COURT.

A. Wilson for the appellant.

Datuk Wan Mustapha bin Haji Ali for the respondent.

In the court below the following grounds of judgment were delivered on November 14, 1971:

Ibrahim J.: The 3 pieces of lands, Lots Nos. 254, 255 and 256 in Mukim of Kubang Telaga in the District of Bachok originally belonged to one Mentosa (f) who died after the last war some time during the B.M.A. period. During her life-time she had given whole of Lot 254 and half share each of Lots 255 and 256 to her son Merah and the other half share of Lots 255 and 256 to her daughter Hajjah Mek Yah. Hajjah Mek Yah died on 18 August 1956 leaving a daughter, the defendant, and her brother Merah, as her beneficiaries. She had a son named Awang Mat who had died during the Japanese occupation and whose widow was Membunga. Merah himself died at the age of 102 years in Kampong Padang Pak Amat in the District of Pasir Puteh about 4 miles from the 3 lots on 4 December 1956 leaving besides the 3 lots 2 other lots in Kampong Padang Pak Amat in the District of Pasir Puteh. Petition for Merah's estate was filed on 2 January 1963 by Awang Senik the surviving son and sole beneficiary of the deceased and this was heard by the Collector, Pasir Puteh, on 5 February 1963 and formal order for distribution was issued on 10 March 1963. In accordance with the order Lot 254, half share each of Lots 255 and 256 were transmitted to Awang Senik. Merah had another son named Hamat who however predeceased him and whose widow was the defendant. On 11 May 1965 and again on 6 June 1965 the defendant wrote to the District Officer, Bachok, claiming that she had bought the lands from Merah. The collector held an inquiry on 21 September 1965 and on subsequent days ending on 2 August 1966. While the inquiry was being held the collector had on 17 November 1965 caveated the lands under section 194(e) of the Kelantan Land Enactment in order to prevent any further dealings thereon. On 3 August 1966 the collector wrote to the defendant, with a copy to the plaintiff, advising her to take the matter to the High Court. Meanwhile on 7 August 1966 Awang Senik had filed this action in this court. Soon after filing this action he became sick and he gave his grandson, Ahmad bin Hussin, power of altorney to carry on the action on his behalf. Awang Senik died some time in 1970 and by order of Assistant Registrar made on 16 January 1971 Ahmad bin Hussin was appointed representative of deceased Awang Senik. Awang Senik left 3 beneficiaries: his widow (PW4), his son and the father of Ahmad bin Hussin named Hussin bin Awang Senik (PW2) and his daughter named Mek (PW5). The defendant had been in continuous occupation of the lands for many years since during the life-time of Merah.

The above facts were undisputed and the plaintiff's claim in this action was for an order that the caveat (P1) be withdrawn, for vacant possession and damages for unlawful occupation and use of the lands.

The defendant resisted the claim and alleging that she had purchased the lands from Merah she counterclaimed for an order

"that the said whole share of Lot 254 and ½ share each of Lots 255 and 256, Mukim Kubang Telaga, Gunong Timor, Bachok, registered in the name of Awang Senik bin Merah, deceased, be registered in the name of Hajjah Mek binti Hussain, as purchaser."

Though not specifically pleaded evidence was adduced on behalf of the plaintiff that the defendant's occupation of the lands was by virtue of a lease given to her by Merah and the decisive issue of fact in this case was whether the defendant had purchased or merely leased them from Merah.

In connection with this issue Ahmad bin Hussin (PW1) who was about 19 years old when Merah died in 1956 said that during Merah's life-time Hajjah Mek Yah and her daughter, the defendant, were planting padi on Lots 254 and 255 and collecting the coconuts and other fruits from Lot 256 belonging to Merah for which Merah got from her 100 gantangs of padi and $15 per annum respectively. Merah who was in good health collected the rentals himself and used to visit the lands once in 3 months. He himself had been to the lands together with Merah but had not seen Merah collecting the rentals or the defendant sending them to Merah in Kampong Padang Pak Amat. After Merah's death the defendant had not paid the rentals to anyone though she continued to occupy the lands and Awang Senik had asked for them. He also alleged that the defendant knew that Awang Senik had made a petition for distribution in 1963 but the defendant had not made any claim at the hearing. The notice of hearing was posted on the lands. As far as he knew Merah never told Awang Senik that he had sold any of his lands in Bachok and Merah himself had told him in around 1950 when he was about 12 years old that he had not sold any of his lands in Bachok to the defendant. To further substantiate his contention that the lands were merely leased and not sold to the defendant he also alleged that during his life-time Merah had paid the quit rents on the lands and after Merah's death Awang Senik had paid them and after his death his son Hussin had gone to pay the quit rents for 1971 but they had been paid. He himself paid the quit rents for 1965 and when he went to pay them for 1966 they had already been paid.

Hussin (PW2) and Mek Som binti Salleh (PW4), the son and widow respectively of Awang Senik, also gave evidence in support of PW1 that the defendant had not bought but only leased the lands from Merah. Both confirmed PW1's evidence that Hajjah Mek Yah and the defendant were occupying the lands on lease from Merah and that after Merah's death Awang Senik had tried to collect the rentals but the defendant refused to pay though she continued to occupy the lands. PW4 went further and said that she herself had seen the defendant give $50 for the 100 gantangs of padi to Merah, some in red notes, 2-3 times, in the presence of Awang Senik and PW1. Both denied that they knew that the defendant had bought the lands from Merah.

According to the defendant (DW1) she had bought Lot 254 from Merah for $50 three to four years before the last war and the half shares in the other 2 lots for

$100 after the British occupation. The collector might have misunderstood her when he recorded that she had said that she had bought Lots 255 and 256 at $100 each. Merah used the proceeds from the sale of those 2 lots for the funeral expenses of his mother Mentosa. She paid $100 on the day Mentosa died in the presence of her sister-in-law Membunga (DW4), the Tok Imam who had since died and Mek binti Haji Saad (PW3). She had been occupying the lands from the times she bought them. She was presently living about ½ mile away from the lands since about 20 years ago but before that she had lived on the coconut lot she bought from Merah. She denied that her house was on her mother's portion of Lot 256 and that she had moved from the lot because her mother had given her share thereof to her son who was DW4's husband. Awang Senik had taken $35 from her for distribution of Merah's estate and transfer of the lands to her. She did not know the date of hearing of the petition in Pasir Puteh and therefore did not attend it. She had approached him several times but he said that the notices had not been issued. Finally he told her that the lands had been registered in his name for a long time. She subsequently sent 2 petitions to the District Officer, Bachok, and attended an inquiry subsequently made by the collector. Her mother had sold her shares in Lot 255 and 256 to DW4 on the same day that Merah sold his shares to her, *i.e.*, on the day Mentosa died. Her mother also used the money for her mother's funeral expenses. She petitioned for distribution of her mother's estate in January 1963. She agreed that there was nothing mentioned in the petition that her mother had sold her shares in the 2 lots to DW4. The 2 lots were given to DW4 at the hearing on 29 May 1963. Both Awang Senik and she had agreed to give her mother's shares of the 2 lots to her because she had bought them from the deceased. She denied that they had renounced their shares because DW4 had 7 children. She had first asked Merah to transfer the lands over a month after Mentosa's death. The 2nd occasion was a mother later. He was sick on both occasions. It was because of his sickness and also because he was her uncle whom she trusted that she did not take steps to get the transfers executed. She had paid the quit rents on the lands since she bought them. D2A, B, C and D were receipts for 1966, 1968, 1970 and 1971 quit rents respectively.

The defendant called Ismail bin Ali (DW2) the Penghulu, Kampong Kubang Telaga, since about 24 years ago, Mek binti Haji Saad (DW3) and DW4 to substantiate her story. DW2 and DW3 both said that Merah had told them on the day of his mother's death that he had sold Lots 255 and 256 to the defendant to meet his mother's funeral expenses but while DW2 said that DW4 had also bought Mek Yah's shares of the 2 lots on the same day DW3 said that DW4 had bought them before that day. DW4 said that Merah had sold his shares in the 2 lots to the defendant to meet his mother's funeral expenses and that she saw the defendant pay Merah the $100. She had bought Hajjah Mek Yah's shares earlier on, before Mentosa was even sick. She bought them for $100 and not for $300 as stated in her letter to the collector which was prepared by a petition writer. Both the defendant and Awang Senik renounced their shares in her favour at the hearing for distribution of Hajjah Mek Yah's estate.

On the evidence before me I found that on the balance of probabilities the defendant had bought the lands from Merah as alleged by her. There was contradictory evidence as to who was paying the quit rents since the defendant's occupation of the lands but since Awang Senik himself had said at the inquiry before the collector that it was the defendant who had paid the rents and had kept the receipts and that he had only reimbursed her and as the two payments made by Awang Senik were made in 1967 and 1970, i.e. after this action had been filed I accepted the defendant's contention which was supported by the 4 receipts she produced that she had been paying the quit rents since she started to occupy the lands except for those 2 years when presumably Awang Senik had jumped the gun and paid them. The defendant's explanation that the collector might have misunderstood her when he recorded that she had said that she had bought Lots 255 and 256 for $100 each was a reasonable one, and so was her explanation as to why she had not attended the hearing of the petition in respect of Merah's estate in Pasir Puteh. When Awang Senik finally told her that the lands had been registered in his name she wrote the 2 letters to the District Officer. It was contended on behalf of the plaintiff that DW4 had not herself bought the defendant's mother's half shares of the 2 lots and that her evidence as a whole was therefore not reliable. It did not agree with this contention for though the brief record of the proceedings before the collector, Bachok, only described her as the daughter-in-law of the deceased and not as purchaser, she was not a beneficiary of the deceased's estate and it was quite obvious that her claim that she had purchased the half shares of the 2 lots from deceased as stated in her letter to the collector must have been the reason for both the defendant and Awang Senik who were the only beneficiaries of deceased's estate to have agreed to give them to her and for the collector to have made the order giving them to her. The letter was prepared by a petition writer and I considered it highly probable that the petition writer had made a mistake when he wrote that the price was $300. There were discrepancies in the evidence of the defendant and her witnesses as to when DW4 had bought them but such discrepancies did not in my view affect the truth of the allegation made by her and her witnesses that the defendant herself had bought the lands from Merah, particularly when PW1 and other witnesses for the plaintiff had given more serious contradictory evidence regarding the alleged payment of rentals made by the defendant to Merah. PW4 even went to the extent of saying that PW1 was present when some of the payments were made when PW1 himself had said that he was never present at any of the alleged payments. Furthermore since the defendant's contention that she had occupied the lands from the time she bought them was not disputed and as her evidence clearly indicated that she had occupied Lot 254 many years earlier than the other 2 lots I could not comprehend how the rentals alleged to have been paid to Merah over the years were the same. Even Awang Senik at the inquiry before the collector had not specifically said that his father

had told him that he had not sold the lands to the defendant and I could not see any reason why Merah should have told PW1, as alleged by PW1, that he had not sold the lands when PW1 was only 12 years old. Merah was over 100 years when he died and however healthy he might have been I could not imagine his having gone to collect the rentals and visited the lands once in 3 months as alleged by PW1 in the years before he died.

In his amended reply to the counterclaim the plaintiff pleaded that the counterclaim was barred by limitation under the Limitation Ordinance 1953. In reply to this, counsel for the defendant relied on the case of *Munah* v. *Fatimah*[1] where the head-note read as follows: -

"The plaintiff in 1946 entered into an agreement with the defendant and her brother, who were the beneficiaries to the estate of one Hamat, to purchase a piece of *padi* land, which was registered in the name of the deceased, for a consideration of $500. She went into occupation of the said land and cultivated it with *padi* and had since reaped the economic crops and enjoyed possession and profit without hindrance from the beneficiaries for a period of 19 years. She had also paid the annual quit rents for the land. She had repeatedly asked the beneficiaries to take out letters of administration in respect of the deceased's estate so that they could transfer the said land to her, but they did nothing. After unsuccessful attempts by the plaintiffs to get the land transferred to her, she instituted these proceedings claiming *inter alia,* that the land in question be transmitted and registered in her name."

It was *held* that —

"(1) as from the time the plaintiff went into occupation she was the equitable owner of the said land. What was required now was to clothe the equitable estate with a legal title. She was therefore entitled to the relief claimed;

(2) in this case time did not run against the plaintiff as it was not that species of laches which would prevail against the equitable title."

The facts in this action were quite similar to those in that case but in my view that case could not be of much help to the defendant for therein Raja Azlan Shah J. was dealing with equitable laches and not with statutory limitation which was not pleaded therein but was pleaded in this case.

It had been decided by the Federal Court in *Ponnusamy & Anor.* v. *Nathu Ram*[2] that in an action to recover land the period of limitation would be 12 years as provided by section 9(1) of the Limitation Ordinance 1953 which read as follows: -

"9.(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person."

In the course of his judgment in that case Thomson C.J. (as he then was) at page 88 said: -

"It follows from what has been said that the period of limitation applicable in the present case was 12 years by reason of section 9 and not 6 years by reason of section 6 and it is common ground that by reason of the post-war legislation on the subject that period of limitation runs from the expiration of the moratorium period on 30th September, 1949. In the circumstances the present action was commenced well within time."

It was submitted by counsel for the plaintiff that the judgment in the case clearly indicated that but for the moratorium period the right of action would have accrued from the date of the agreement. I did not accept this submission for as stated by Gill F.J. in *Nasri* v. *Mesah*[3] at page 34 —

"..., it would seem clear to me that what Thomson C.J. was saying in the above passage was by way of general observation that for the purpose of computing any period of limitation the moratorium period was to be excluded. He clearly did not say in so many words that limitation in that case began to run from the expiration of the moratorium period on 30th September, 1949."

In other words what was decided in that case was that on the assumption that the right of action had accrued from the date of the agreement the appellant had filed his action within the period of 12 years after the moratorium period had been excluded. That case did not decide whether time began to run from the date of the agreement or from the date of any infringement or threat of infringement of the appellant's right under the agreement. In *Ng Moh* v. *Tan Bok Kim & Anor.*[4] such a question had to be and was decided by the Federal Court. The head-note in that case read as follows: -

"The respondents brought an action for the recovery of possession from the appellant of a piece of land in Kuala Lumpur of which they were registered as proprietors. They alleged that the appellant was in unlawful occupation of the land in question and had built houses thereon without their knowledge and consent. The appellant denied that he was in unlawful occupation and alleged that he was in possession under a sale agreement dated December 30, 1950 between himself and one *L* as administratrix and counterclaimed for specific performance.

The learned trial judge held that the counterclaim was barred by limitation in that 12 years had elapsed between the date of the agreement and the date of the counterclaim, (September 16, 1965)."

It was *held,* allowing the appeal:

"the cause of action accrued on *L*'s failure to take the necessary action under clause 2 of the agreement after the lapse of 14 days from the date of a letter Exhibit D.3 and not from the date of the agreement. The failure to initiate the necessary action was the first clear unequivocal threat to infringe the appellant's right. In the circumstances the appellant's counterclaim filed on September 16, 1965 was within time."

It was submitted by counsel for the plaintiff that based on the decision in that case the cause of action in this action had accrued when Merah failed to execute the transfer after having been requested by the defendant to do so soon after the alleged agreement in respect of Lots 255 and 256 was made, irrespective of the reason for such failure. I did not also accept this submission. Merah did not execute the transfer because he was sick and since he was the defendant's uncle whom she trusted there was no reason for her to believe that the lands would not ultimately be transferred to her and in my view Merah's failure to execute the transfer when requested to do so by defendant was not in the circumstances of this case an infringement or threat of infringement of her right under the 2 agreements made between them. Each case must be decided on its particular facts and it was obvious that in *Ng Moh's* case the Federal Court had decided that in the circumstances of that case the failure to initiate the necessary action on the part of Lim Pheng was the first clear and unequivocal threat to infringe appellant's right.

It was also submitted by counsel for the plaintiff that since the counterclaim in this case was for a declaration and not for specific performance the right of action had accrued when the alleged agreements

were made and the purchase moneys paid. I did not also accept this submission for *Nasri's* case clearly showed that whether the action was for specific performance of an agreement for the sale of a land or for declaration of title to a land it was essentially an action to recover land and that for the purpose of limitation time began to run from the date of any infringement or threat of infringement of the claimant's right under the agreement. The cause of action in this case arose from the 2 agreements and as stated by Gill F.J. in that case, at page 34 —

"... what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach."

I accordingly dismissed the plaintiff's claim with costs and gave judgment for the defendant as counterclaimed.

[From the above judgment the plaintiff appealed to the Federal Court. The following judgment was delivered:]

Suffian F.J.: This is a dispute regarding three lots of land in Mukim Kubang Telaga, Daerah Gunong Timor, Bachok, Kelantan.

The parties are related, as can be seen from the family tree in the appendix. The following facts are not disputed. Originally the three lots belonged to a lady named Mentosa who had a son Merah (the original plaintiff's grandmother and the present plaintiff's great-great-grandmother) and a daughter Hajah Mek Yah (the defendant's mother). During her lifetime Mentosa gave the whole of lot 254 to her son Merah. As to the other two lots Nos. 255 and 256, she gave a half share in each to her son and the other half share in each to her daughter. The daughter died, and her half share in each of lots Nos. 255 and 256 came to be registered in the name of her daughter, the defendant.

Merah then died, and the whole of lot 254 and his half share in each of the other two lots came to be registered in the name of his son Awang Senik, the original plaintiff.

At the time of the dispute the whole of lot 254 was registered in the name of Awang Senik, and a half share in each of the other lots was registered in Awang Senik's and the other half share in each of these two lots in the defendant's name; but it was not disputed that the defendant was in possession of all three lots.

The original plaintiff Awang Senik claimed that as a beneficiary of Merah his father's estate he was entitled to the whole of lot 254 and to a half share in each of the other two lots. The dispute came to the notice of the Land Office and the Registrar caveated the interests claimed by Awang Senik and advised the defendant to sue in the High Court. Instead Awang Senik turned the table and brought this suit against the defendant.

On 7th August, 1966, he sued the defendant for an order that the caveat be removed and that the defendant who was in possession of the whole of the three lots deliver to the plaintiff vacant possession of the whole of lot 254 and of a half share in each of the other two lots.

Before the trial Awang Senik died and his grandson, the present plaintiff, continued the suit as representative of his estate.

The defendant resisted the claim. She said that before the war she bought the whole of lot 254 from the original owner Merah her uncle for $50, and that after the war during the BMA period she bought Merah's half shares in the other two lots for $100, that she had repeatedly asked Merah to transfer them to her at the Land Office but Merah was always sick, and that after Merah's death (in 1956 at the age of 102) the first lot and the half share in each of the other lots were distributed to his son Awang Senik without the defendant's knowledge, though he undertook to admit the defendant's claim as purchaser; she counterclaimed for an order that the whole of lot 254 and Merah's half share in each of the other lots be registered in her name.

The plaintiff denied the sales and further pleaded that the defendant's counterclaim was barred by limitation.

The issue was — had the defendant bought the whole of lot 254 and her uncle Merah's half share in each of the other two lots from her uncle Merah? The learned judge decided in favour of the defendant, dismissed the plaintiff's claim and allowed her counterclaim.

The plaintiff appeals.

Mr. Wilson on behalf of the plaintiff first submits that the trial judge was wrong in finding that on a balance of probabilities the defendant had bought Merah's interests. I do not think that it would be proper for this court to disturb this finding. The trial judge was aware that it was for the defendant to prove that she had bought them. The conflicting evidence produced was oral and the judge's decision depended entirely upon which parts of that conflicting evidence of the witnesses were to be believed. An appellate court is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and hesitations and any visible signs of confidence or embarrassment *(Tan Chow Soo* v. *Ratna Ammal*[5]*)*. I would therefore uphold the learned judge's finding that the defendant had bought the whole of lot 254 and Merah's half share in each of the other two lots, from Merah.

It is next argued that the learned judge was wrong in holding that the counterclaim had not been barred by limitation.

The defendant's counterclaim was an action to recover land and therefore by virtue of section 9(1) of the Limitation Ordinance, 1953, which provides —

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him...."

the defendant should have brought her counterclaim within 12 years of the date on which her right of action accured.

The first question concerning limitation is one of law — when did the defendant's right of action accrue?

I have studied the cases cited by Mr. Wilson on limitation, and in particular a Privy Council decision, *Bolo* v. *Koklan*;[6] one decision of this court's predecessor (namely, the Court of Appeal) in *Ponnusamy & Another* v. *Nathu Ram*;[2] and two decisions of this court, *Ng Moh* v. *Tan Bok Kim & Another*[4] and *Nasri* v. *Mesah*;[3] and I am satisfied that the defendant's right of action accrued not from the date of the sales but from the time when the defendant asserted her right and it was infringed by Merah or the plaintiff or from the time when there was a clear and unequivocal threat by Merah or the plaintiff to infringe that right.

The next question concerning limitation that arises is one of fact — when did the first clear and unequivocal threat by Merah or the plaintiff of the defendant's right occur? If it occurred more than twelve years before the date of the counterclaim, then the counterclaim is statute-barred. As to this, it should be borne in mind that the onus is not on the defendant but on the plaintiff to prove that the threat took place more than twelve years before the date of the counterclaim.

The evidence produced by the plaintiff is as follows. Hussin, the plaintiff's father and the original plaintiff's son, said that after Merah's death Awang Senik (the original plaintiff) tried to collect rents from the three lots concerned, but the defendant refused to allow him to do so. Mek Som, Awang Senik's widow, gave evidence to the same effect.

The evidence produced by the defendant is as follows. The defendant herself said that Merah died in 1956, and that she did not take action to get the lots formally transferred to her because when she saw him on two occasions he was sick and that she trusted him because he was her uncle. In cross-examination she said that she first asked Merah to transfer the lands over a month after her grandmother Mentosa's death, and that she asked him on the second occasion a month later, and that he was sick on both occasions.

It is not disputed that Merah died in December 1956. If his refusal to transfer to the defendant may be interpreted as an infringement of the defendant's right, then it may be said that her counterclaim (dated 19th May, 1971) was statute-barred, having been made 12 years later.

But I do not think that it can be so interpreted, because when Merah failed to transfer to the defendant he did not deny her right.

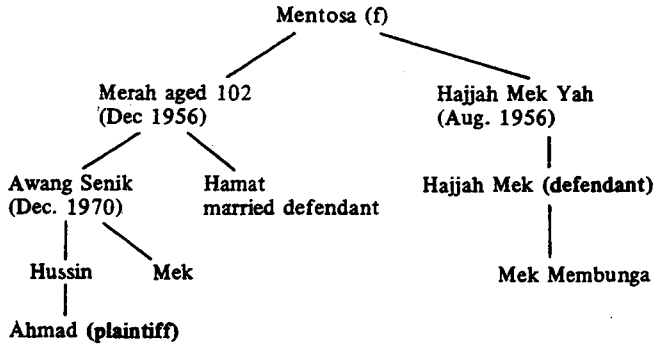
Hussin's and Mek Som's evidence that after Merah's death Awang Senik tried to collect the rents from the three lots concerned but that the defendant refused to allow Awang Senik to do so, showed on the contrary that was the first time that there was a clear and unequivocal threat by the original plaintiff to infringe the defendant's right. But it is to be observed that the evidence produced on behalf of the plaintiff was not specific as to the time when this threat to the defendant's right from the original plaintiff first occurred. All it said was that it occurred after Merah's death. It could have occurred in 1957, or at any time between that year and the filing of this suit. In view of this, in my judgment the learned judge was entitled to hold that the defendant's counterclaim was not statute-barred, since the plaintiff has not discharged the onus of proving that it was.

I would therefore dismiss this appeal with costs here and below.

Azmi L.P. and **Ali F.J.** concurred.

Appeal dismissed

APPENDIX



Note: Dates are dates of death.

Solicitors: *Wilson & Co.; Wan Mustapha & Co.*

LING HENG TOH CO. v. BORNEO DEVELOPMENT CORPN. SDN. BHD.

[F.C. (Azmi L.P., Ismail Khan C.J. Borneo and Ali F.J.) August 30, 1972]

[Kuching — Federal Court Civil Appeal No. 106 of 1971]

Contract — Building contract — Payment on interim certificate — Whether payment can be demanded without certificate.

The appellants had entered into a contract with the respondents for the construction of a wharf and river wall in Sarawak. It was agreed that payment for the work actually carried out would be made monthly against the certificate of the engineer. During the progress of the work, three interim certificates had been issued by the engineers and paid by the respondents. The dispute in this case related to the fourth interim certificate. The appellants had asked the engineers for a fourth interim certificate for $35,415.89 but the engineers issued a certificate for the sum of $18,161.61 only. The appellants after some correspondence brought an action against the defendants for the balance of $17,254.27. It was alleged *inter alia* in the statement of claim that the engineers had not acted impartially and independently between the parties and had wrongly certified that only $18,161.61 was due. The learned trial judge dismissed the action and the appellants appealed.

Held: as the trial judge had found that there was no fraud or collusion between the respondents and the engineers and that the respondents had not interfered with or obstructed the engineers in issuing the certificate nor had they given instructions which impeded the engineers in the issue of the certificate, the appellants had failed to show that they could proceed in the action without a certificate.

Cases referred to:-

(1) *Engleshen* v. *McMaster* [1920] All E.R. Rep. 674 at pp. 676, 678.